IN THE

SUPREME COURT OF THE UNITED STATES.

THE NATIONAL BRONX BANK OF NEW YORK,
Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

BRIEF IN SUPPORT OF PETITION.

STATEMENT OF THE CASE.

The petitioner is a national banking association incorporated March 13th, 1926 and is subject to the jurisdiction of the United States Comptroller of Currency (Stipulation, fol. 120). The petitioner's income tax returns for the taxable years 1938 and 1939 were filed with the Collector of the Fourteenth District of New York upon an accrual basis (Stipulation, fol. 121). The petitioner reported the sale in the years 1938 and 1939 of certain bonds which it had purchased several years prior thereto. The statistical data concerning the said securities, the date of purchase, par value, cost, prior charge-offs or write-downs, selling price, etc., are contained in Exhibit "A" of the stipulation (fols. 130-132). It was stipulated (fol. 125) that all of the bonds write-downs were on the order of national bank examiners who periodically audited the books and accounts of the bank with a view to its financial condition and solvency.

In 1933 and in 1935 and 1936 the bank examiners directed the petitioner to write-down the values of certain securities in its books, to certain arbitrary sums below cost. The uncontradicted testimony of H. G. Barber, Executive Vice-President of the bank, is to the effect that such write-downs were involuntary and were made solely in slavish obedience to the bank examiner's orders (fol. 138) and the Court below so found as a fact (fol. 79). Furthermore, that the bank had available such standard services as Moody's, Standard Statistics and Poor's with regard to the financial status of the obligors named in the bonds (fol. 138) and that from such information the petitioner had "no intention of writing down these bonds because, as stated previously, we felt that the reports we had justified us carrying those bonds at the cost to the bank" (fol. 153). The financial statements and reports concerning the obligors of the bonds is contained in petitioner's Exhibit "1" (fols. 238-543). The information therein contained was submitted to and checked by counsel for the respondent (fol. 143). The evidence was not objected to as to form but solely on the ground that it was immaterial (fol. 144).

For example (fol. 130), thirty $1,000 bonds of International Telephone & Telegraph at 4½%, purchased at a cost of upwards of $39,000, were written down to par in 1935, despite the fact that the financial statement of International Telephone & Telegraph, certified and audited by most reputable authorities, showed net assets over and above liabilities in excess of $268,000,000 (fol. 65) with a most lucrative thriving business.

Needless to say, the write-downs ordered by the bank examiners constituted only a bookkeeping entry dictated by conservative banking principles. The fact is that after the write-downs were made, they were necessarily reflected in the current financial and profit and loss statements of the petitioner and, likewise, were incorporated in the income tax returns for the respective years, not because of any tax benefits derived therefrom, but merely as a true disclosure of profits and losses according to its books, in compliance with Treasury Department regulations.

The Court below held, as a mixed question of law and fact, that the mere inclusion and deduction of the write-downs in the tax returns for the respective years constituted a representation of ascertainment of total or partial worthlessness of the said securities. Furthermore, that the Commissioner had "allowed" the deduction for the year in question. Petitioner denies (as a matter of law) that the Commissioner did allow such deduction in 1935 and relies upon the entire file produced by the Commissioner of Internal Revenue as petitioner's Exhibits "2", "3", "4" and "5" (fols. 544-594) as incontrovertible evidence to the contrary.

Thus, the basic factual evidence is not in dispute or controversy. There is complete agreement as to the factual evidence. Inferences and conclusions of facts drawn from the agreed statement of facts are in most instances questions of law or a mixed question of law and fact, reviewable by this Court. *Commissioner* v. *Heininger*, 320 U. S. 467, 64 S. Ct. 249.

JURISDICTION.

(1) Jurisdiction of this Court is based upon Judicial Code Section 240 (a) and upon the provisions of Revenue Act of 1926, Chapter 27, Section 1003, 44 Stat. 110;

(2) The original date of the judgment sought to be reversed is February 9th, 1945.

SPECIFICATION OF ERRORS.

(1) The decisions of the Courts below are in conflict with the decision of this Court in the case of *Dobson* v. *Commissioner*.

(2) The Courts below erred in holding that an erroneous claim by a taxpayer for an unallowable deduction in prior years is a bar to a renewal of the claim subsequently.

(3) The Courts below erred in holding that the bonds which were written down were wholly or partially worthless despite conclusive proof of solvency of obligors.

(4) The Courts below erred in holding, as a matter of law, that claims of the taxpayer for deductions in prior years had been "allowed" by the Commissioner upon uncontroverted evidence to the contrary.

(5) The Courts below erred in refusing to grant the petitioner relief under Section 116 of the Revenue Act of 1942.

POINT I.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISION OF THIS COURT IN DOBSON v. COMMISSIONER, 320 U. S. 489, 64 S. Ct. 239.

The Tax Court rendered its decision before the publication of the opinion of this Court in the *Dobson* case. Hence, it concluded its opinion (fol. 89) as follows:

> "The fact that petitioner enjoyed no tax benefit from such deductions in certain of the years when they were claimed and allowed is immaterial. Bank of Newberry, 1 T. C. 374. Cf. Virginian Hotel Corporation of Lynchburg v. Commissioner, 319 U. S. 523."

which represents a subordination of the opinions of the Tax Court as rendered in *Estate of James M. Collins* v. *Commissioner*, 46 B. T. A. 765 and 770 to the decision of the Circuit Court 133 F. 2d 732.

We pleaded in the Circuit Court herein, that the matter be remitted to the Tax Court for reconsideration in the light of the decision of this Court in the *Dobson* case. We do believe that had the opinion in the *Dobson* case been published

earlier, the Tax Court might have arrived at a different conclusion.

The *Virginian Hotel* case above cited refers to depreciation, which is a constant factor of loss which may not be accumulated by the taxpayer. A claim for worthlessness must be predicated upon some identifiable event,

> *Industrial Rayon Corp.* v. *Commissioner*, 94 Fed. (2d) 383 at 384.

The Treasury Department has so ruled and the Courts have sustained the Commissioner. Income Tax Unit Regulation, published as I. T. 1221, 11-CB 155, reads:

> "The amount of depreciation of bonds which banks are required to charge off by specific instructions of the State Bank Commissioner is deductible as a worthless portion of a debt only when the decline in value is due to the fact that the debtor corporation will not be able to pay the full amount of the obligation at maturity; but not where the decline is due to any other cause."

The opinions of the Circuit Court herein, we respectfully submit, stress some of the *obiter dicta* in the opinion of this Court in the *Dobson* case and overlook the basic principles involved in the opinion. The opinion of this Court at page 506 reads:

> "We only hold that no statute or regulation having the force of one and no principle of law compels the Tax Court to find taxable income in a transaction where as a matter of fact it found no economic gain and no use of the transaction to gain tax benefit."

Had the Tax Court given full consideration to all the facts and circumstances of the case and rendered its decision on the merits, the appeal from its decision may not have been taken. The petitioner feels aggrieved because of the Tax Court's ruling above quoted (fol. 89) that the fact that the petitioner enjoyed no tax benefit from such deductions in certain of the years when they were claimed is immaterial.

We respectfully submit that the fact is material and the failure to take such fact into consideration is not an adjudication on the merits. We respectfully submit that the facts and principles involved in the case at bar are analogous to the case of *Dobson* v. *Commissioner*, *supra*, with the exception that in the *Dobson* case the deductions claimed in prior years had concededly been "allowed" by the Commissioner, whilst in the case at bar we seriously question that such an allowance had been made.

POINT II.

THE TAXPAYER IS NOT ESTOPPED FROM ASSERTING LEGAL RIGHTS BY AN ERRONEOUS CLAIM FOR AN UNALLOWABLE DEDUCTION IN ITS RETURNS IN PRIOR YEARS.

The Tax Court found, as a matter of law (fols. 79-81), that the disclosure by the petitioner in its previous returns and by its claim for deductions thereunder for write-downs entered on its books by order of the bank examiners, constitutes a legal estoppel and bar to a consideration of the taxable gain on the sale of the bonds, on the merits.

We respectfully submit that such ruling is contrary to the established precedent and contrary to the statutes and contrary to the law and spirit of departmental regulations and practice.

The Revenue Act requires every corporation to make a disclosure to the Commissioner of Internal Revenue of pertinent facts to fix tax liability and to suggest therein its own assessment on printed forms furnished for that purpose. The statute does not provide for amendment of returns; that is left entirely to departmental regulations.

> *National Refining Co. of Ohio et al.*, 1 B. T. A. 236 at 240.

The Treasury Department regulations do permit amendments of return either by the Commissioner or by the taxpayer. The Commissioner as well as the taxpayer may file amended returns increasing or decreasing the tax liability reported in the original return. Where the Commissioner assesses additional taxes and does not file an amended return, the taxpayer need not do so.

Joseph Garneau, 1 B. T. A. 75;
Maryland Casualty Co. v. *U. S.*, 251 U. S. 342 at 354;
U. S. Internal Revenue Code, Sections 3612 (a and b) (app. p. 27).

We respectfully urge that the Court below attached too much importance to the affidavit of verification appended to the return and drew unwarranted inferences from such verification. The verification of a return by an officer of a corporation implies that the information on the return is correct to the best of his knowledge. This does not preclude any error made either in law or in fact as long as it is innocent and without intent to evade the tax. As a matter of fact, in the year 1938, when the returns under consideration were filed, the Treasury Department enforced the published official opinion of Hon. Morrison Shafforth, its chief counsel (G. C. M. 18525; app. p. 24), which permitted the restoration of write-downs to cost upon a sale of bonds in any case wherein the bank received no tax benefits from previous deductions for write-downs. The ruling was subsequently modified. So, too, in the year 1935 when the taxpayer filed its return, the Treasury Department had promulgated and enforced Article 23 K (1) of Regulation 86 and Article 191 of Regulation 77 as amended (app. p. 28), which provided that for income tax purposes the bank examiner's order was conclusive evidence of worthlessness and that the deduction must be claimed within the taxable year to entitle the bank to any credit. True, the decision of the Tax Court has declared that regulation unconstitutional but the taxpayer in filing his return should not be punished for observing Trea-

sury Department regulations or for following the official opinion of the general counsel of the Treasury Department or for adopting any other legal opinion when he does so in good faith. As was said by Chief Justice Hughes in the cases of

> *Panama Refining Co.* v. *Ryan*, 293 U. S. 388;
> *Morgan* v. *U. S.*, 304 U. S. 1 at page 22:
> "Administrative agencies must accredit themselves by acting in accordance with the cherished tradition embodying the basic concepts of fair play."

Assuming, but by no means conceding, that in the previous years of write-downs, the deductions were claimed by the taxpayer and that they were actually "allowed" by the Commissioner, nonetheless, under the provisions of Section 3801 (b) (2) of the Internal Revenue Code (app. p. 29), the error is not fatal and may be legally corrected. The opinion of the Tax Court (fol. 81) gives a finality to the original return filed by the taxpayer which is not in accord with the law and spirit of the law and with departmental regulations and practices. A tax return is not a pleading in an action but merely the opinion of the taxpayer as to his liability.

So, too, we respectfully urge that the Court below erred in holding that there was no law or regulation requiring the petitioner to claim the deduction for the write-downs, citing

> *Second National Bank of Philadelphia*, 33 B. T. A. 750-755.

The authority cited is not applicable to the situation here for the reason that the regulation of the Treasury Department 23K (1) of Regulation 86 (app. p. 29) in effect in 1935, differs from the language of Article 191 of Regulation 74 (app. p. 28) referred to in that opinion in the following important respects: It provides that charge-offs made by the banks, pursuant to the order of bank examiners, was *conclusively* presumed to be worthless to the extent of the

write-off, and further that the charge-off must be taken within the same taxable year. In 1935, when the petitioner filed its return, it had the alternative of either obeying the regulation or gambling that some court would eventually declare the existent regulation unconstitutional. The fact is, that the ruling was existent and was being enforced by the Department and was even invoked by counsel for the respondent at the hearing before the Tax Court (fol. 144).

The Court below also overlooked the fact that the definition of "taxable income" as given in all the revenue acts from 1918 to 1928 inclusive, is identical in language, as follows:

> "The net income shall be computable * * * in accordance with the methods of accounting regularly employed in keeping the books * * * of the taxpayer."

That definition was judicially approved

U. S. v. Anderson, et al., 269 U. S. 422 at 438.

Once the write-downs were entered in the books of the petitioner, under the direction of the bank examiners, the petitioner was legally obligated to disclose those entries to the Commissioner to determine tax liability. Good conscience and good bookkeeping made such procedure mandatory.

POINT III.

THERE IS NO RATIONAL BASIS IN THE EVIDENCE FOR THE FINDING OF THE TAX COURT THAT THE BONDS IN QUESTION WERE WORTHLESS AND ASCERTAINED TO BE WORTHLESS.

The Tax Court found as a fact (fol. 74) and subsequently repeated it as a conclusion of law (fol. 75):

> "The bonds written down in the respective years were then worthless to the extent of the write-downs and were then ascertained to be so worthless and charged off by petitioner."

We respectfully submit that there is no rational basis in the evidence or in the law to support that finding. "Worthlessness", as applied to bonds and other securities, has a very limited, definite and technical significance in tax jurisprudence. Decline in market price or shrinkage of value of underlying securities does not render a bond wholly or partially worthless for income tax purposes. The Treasury Department has so ruled and the courts have sustained the Commissioner. Thus, Income Tax Unit Regulation published as I. T. 1221, II-CB 155, reads:

> "The amount of depreciation of bonds which banks are required to charge off by specific instructions of the State Bank Commissioner is deductible as a worthless portion of a debt only when the decline in value is due to the fact that the debtor corporation will not be able to pay the full amount of the obligation at maturity; but not where the decline is due to any other cause."

The mere fact that the bank examiner wrote down the bonds of I. T. & T. from the cost of $39,000 to par, $30,000, was an admission by him that the bonds which were maturing in 1939 would be paid in full. It is a well known fact, of which the Court may well take judicial notice, that these bonds were in fact paid in full at maturity and that no one ever suggested or forecast any other possibility. It certainly cannot be said that the I. T. & T. bonds were worthless in whole or in part, either under the technical definition of worthlessness or even under the dictionary definition.

Similarly, the summary of the financial statements of the other obligors, as summarized in the findings of fact (fol. 65), indicating the net worth of each obligor running into the millions, gives rise to the same inference of solvency and ability to meet obligations. The same test and definition of worthlessness has been given by the Courts in:

> *Eaton, Petitioners* v. *Commissioner of Internal Revenue*, 143 Fed. (2d) 876;
> *Miami Beach & Bay Shore Co.* v. *Commissioner*, 136 Fed. (2d) 408;
> *Quinn et al Executors* v. *Commissioner*, 111 Fed. (2d) 372.

In the case at bar, the taxpayers sought and obtained all the available financial statements of the obligors, audited and certified by reputable certified public accountants, together with reports from the well known and reputable financial agencies such as Moody's, Poor's and Standard Services, which are commonly used by banks and other financial institutions and by traders in securities. These statements were submitted to counsel for the respondent and were checked by him before the trial for accuracy. Counsel for respondent (fol. 143) admitted that the documents had been checked and made no objection as to the form of the statements offered in evidence. He objected merely on the ground of their materiality.

We respectfully take exception to the statement in the opinion of the Tax Court (fol. 84) to the effect that there was no substantiating evidence to the correctness of these statements and that the proof is not persuasive that the bonds had a greater value than that determined by the bank examiner. Sales running into the millions are made almost daily in reliance upon the truth of the very statements marked in evidence upon which the financial world relies. The Tax Court, however, we believe and respectfully submit, misconceived the petitioner's purpose of introducing these financial statements in evidence. Assuming that each and all of these statements had been gross misrepresentations and falsehoods, it would not alter the legal principle involved, namely, that the petitioner (and presumably the bank examiner) having relied thereon and believed them to be true had a mental reaction of security which is not consistent with "ascertainment" of worthlessness. The courts have stressed that the "subjective attitude of the taxpayer is of more importance than the factual and objective evidence". The revenue laws were not intended to punish optimists.

Smith v. *Helvering*, 141 Fed. (2d) 529 at 531.

From the conceded facts of the case at bar, there was no "worthlessness" of the bonds and securities hence there could have been no ascertainment of worthlessness.

POINT IV.

THE TAX COURT ERRED IN FINDING THAT DEDUCTIONS CLAIMED IN PRIOR YEARS FOR BOND WRITE-DOWNS WERE "ALLOWED" BY THE COMMISSIONER.

The entire file of the petitioner's tax return for 1935 is in evidence (Exs. 2, 3, 4 and 5; fols. 544-594).

The revenue agent recommended assessment of tax liability (Ex. 2; fol. 545) of $1,803.17, based upon an amendment of the return in accordance with a detailed statement (fols. 556-561). At folio 557 the following appears:

> "(c) $63,613.59—This represents the write-down in market value of bonds held on December 31, 1935. Depreciation in value of securities is not allowable as a deduction from income; it should be charged to surplus. These bonds were not sold nor did they become worthless, their value was merely written down to market."

Accordingly, the net income for the taxable year was fixed at $13,113.97 by the revenue agent (fol. 561).

The foregoing schedule was further revised and amended (fol. 571) upon the following explanation:

> "$119,510.23—This represents bad debts written off by order of the Federal Bank authorities, but not charged to profit and loss. In accordance with G. C. M. 18525 C. B. XV-1 (1936) such debts shall be conclusively presumed to be worthless. It would appear that the taxpayer is compelled to take the deduction of the $119,510.23 in the year that it was ordered to be written off."

With the foregoing recommendation the file was forwarded to the Commissioner of Internal Revenue in Washington (fol. 570). The position taken by the petitioner herein and communicated to the Commissioner was:

That assuming that the foregoing rulings were correct, that, nonetheless, if the petitioner received credit under Section 121 of the Revenue Act (fols. 589-591) for exemption

on the preferred stock dividends paid to the Reconstruction Finance Corporation in the sum of $14,197.71, there would be absolutely no tax liability on the return as amended by the Collector. As a result, the question was purely academic and required no further protest from the petitioner (fol. 592).

That view was concurred in by the Collector and recommended for approval by the Commissioner (fol. 581) in the following language:

> "Momentarily ignoring the merits of the bad debt issue; the allowance of the $14,197.71 supra, would eliminate the taxable net income recommended by the examining officer."

That recommendation was accepted by the Commissioner and the case was closed (fol. 201).

All official action was based upon the assumption that the figure of net taxable income arrived at by the revenue agent, of $13,113.97 (fol. 561) after disallowance of the respective bond write-downs was *correct*. The assessment was eliminated only by reason of the exemption under Section 121 (fols. 589-591):

> "Any presumption that the petitioner's returns were correct disappears when the Commissioner after an examination officially and in the manner prescribed by statute determines that they were incorrect and so notifies the taxpayer."
>
> *Pennant Cafeteria Co.*, 5 B. T. A. 293.
>
> "When the Commissioner found that the deduction was not proper, the finding was prima facie correct, and cast upon the taxapayer the burden of disproving it by a preponderance of the evidence."
>
> *Quinn* v. *Commissioner*, 111 Fed. (2d) 373 or 373.

We respectfully submit that the file in evidence indicates that the claim for bond write-downs was specifically disallowed. In any event, a claim is not deemed "allowed" if no tax benefit accrues to the taxpayer, as a matter of law and as indicated in General Counsel's opinion G. C. M. 18525 (app. p. 24) sub. (j), subsequently revoked.

POINT V.

THE TAX COURT ERRED IN OVERRULING THE PETITIONER'S CLAIM UNDER SECTION 116 OF THE REVENUE ACT OF 1942 WITH RESPECT TO THE PROCEEDS OF THE SALE OF THE BONDS WRITTEN DOWN PRIOR TO 1938 OR 1939.

Section 116 of the Revenue Act of 1942 (app. p. 30) is retroactive and is incorporated into all prior revenue acts (sub. b and c).

This section and its enactment on the recommendation of the Treasury is referred to by the Supreme Court in the *Dobson* case (*supra*) at pages 248, 249 (64 S. Ct.). It is pointed out that the law is only declaratory of the pre-existing law laid down in prior court decisions opposed to distortion of taxpayers' incomes.

The crucial fact is that in the case at bar the petitioner concededly received no tax benefit from prior write-downs reported in its returns and was, therefore, entitled to relief under the provisions of this section.

CONCLUSION.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

MEYER D. SIEGEL,
Attorney for Petitioner.

ROBERT SIEGEL,
Associate Counsel on Brief.

OPINION.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 97—October Term, 1944.

(Argued January 10, 1945 Decided February 9, 1945.)

THE NATIONAL BRONX BANK OF NEW YORK,
Petitioner,

—VS.—

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Before:

CHASE, HUTCHESON and FRANK,
Circuit Judges.

On Petition for Review of the Decision of The Tax Court of the United States. Affirmed.

MEYER D. SIEGEL and ROBERT SIEGEL, for Petitioner.

SAMUEL O. CLARK, JR., Assistant Attorney General, and SEWALL KEY, ROBERT N. ANDERSON, IRVING R. PANZER and MEYER ROTHWACKS, Special Assistants to the Attorney General, for Respondent.

HUTCHESON, *Circuit Judge*:

In the tax years in question, petitioner sold bonds for less than cost and in each year claimed the difference as a deductible loss. The commissioner disallowed the claim on the ground that the loss had occurred in earlier years and had been then claimed and allowed. This appeal is from a finding and order of the Tax Court sustaining the commissioner and denying the deductions accordingly. Here petitioner's arguments, presented with a vigor and earnestness almost, but not quite, sufficient to make the worse cause seem the better, take wide range. Petitioner is not content with merely challenging the sufficiency of the evidence to support the Tax Court's findings of fact. Invoking Sec. 116(a) 12, Revenue Act of 1942, "Recovery of Bad Debts, Prior Taxes and Delinquency Amounts", and the *Dobson* case[1] as binding precedent, it insists that this is a case for application of the "tax benefit" theory.

We cannot agree. The invoked statute does not deal with deductions for losses but with income attributable to recoveries. As was pointed out in *Dobson's* case at p. 505, it was enacted to deal with situations which, applying the rule of *Putnam National Bank* v. *Comm.* (5 Cir.) 50 Fed. (2) 158, *Helvering* v. *State Planters Bank* (4 Cir.), 130 F. (2) 44, *Commissioner* v. *U. S.* (3 Cir.) 130 F. (2) 894, resulted in apparent hardship. As to *Dobson's* case, there seems to be considerable confusion as to whether it is a precedent for anything, and, if so, for what.[2] It is quite clear though that, dealing as it did with recoveries in subsequent years in respect of stocks sold in prior years at a loss, and determining merely that the Tax Court was justified in finding as a fact that there was no taxable gain, the decision in *Dobson's* case is not a precedent for overturning the Tax Court's decision here of an entirely different question upon entirely different evidence. What is for decision here, and all that is for decision, is whether the Tax Court's finding,

1. 320 U. S. 489.
2. *Dobson* v. *Commissioner*: The Strange Ways of Law and Fact. (Paul), Vol. 57, No. 6, p. 753, Harvard Law Review. Cf. *Law and Fact in Insurance Cases* (Hutcheson), Vol. 23, No. 1, p. 1, Texas Law Review.

that the losses through partial worthlessness occurred and were claimed and allowed as deductions in earlier years, is in accordance with law. The simple statement of the undisputed facts convinces that it is.[3] The fact of which petitioner makes so much, that the examiner required the write-downs, cannot avail petitioner here, for the Tax Court did not base its finding of worthlessness on the fact alone of this requirement. It considered and gave due weight to the voluntary act of petitioner in claiming deductions as for established losses of the amounts of the write-downs as well as to all of the other evidence in the case, and the evidence taken as a whole supports the finding that in fact the partial losses to the extent claimed did then exist and were then actually ascertained, claimed and allowed. The decision and order appealed from is Affirmed.

CHASE, *Circuit Judge* (concurring):

The decisive issue is whether the petitioner's basis for determining gain or loss on the sale of the bonds should be the cost of them or that cost less the amount of the deduction allowed the petitioner in a previous year to the extent that it then wrote down the bonds. The petitioner insists that the deduction thus allowed should not affect its basis because it so happened that the deduction has never affected its tax, as it received no benefit from the allowance of the deduction since no income was thereby freed from taxation in the year of the allowance. It also insists that the write-down is of little, or no, evidential significance as to the then value of the bonds because it was involuntary and required by the bank examiner.

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3. These are that in years prior to the tax years, write-downs were made on the order of the National Bank examiner; that petitioner in income tax returns for years prior to the tax year in question, of its own volition, claimed the amounts of the write-downs as deductions; that these claims were allowed; that the bonds were sold at a figure substantially in accordance with the claimed losses and there was no proof fixing these losses as having occurred in the year of sale or in any years other than the ones in which they were written off.

As the taxability of recoveries in later years of the amount in whole or in part of tax deductions previously claimed and allowed is not involved, that part of *Dobson* v. *Commissioner*, 320 U. S. 489, which deals with the effect of the failure to secure any tax benefit from the allowance of the deduction on the question of the actual receipt of income when making such recoveries is not here applicable.

The fact that the bank examiner did require the write-down, coupled with the fact that the bank made it, is some evidence that the bond had then become worthless to the extent of the write-down and the weight and effect of the evidence as to the circumstances under which the write-down was made were for the Tax Court to determine. When that evidence is considered in connection with the fact that the bank, under no compulsion from the bank examiner to claim any deduction in its income return for that year, did claim such deduction and the Commissioner allowed it there was substantial evidence that the bonds had become worthless to that extent in the year the deduction was claimed and allowed. Accordingly there was the required evidential support of the finding of the Tax Court to the effect that the petitioner did not suffer any actual loss in the later taxable years in which it sold the bonds. That being so, *Dobson* v. *Commissioner*, *supra*, supports not the petitioner but the respondent and requires an affirmance.

Frank, Circuit Judge, concurs in Judge Chase's opinion.